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NO. 95-83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALAN MEGHRIG AND MARGARET MEGHRIG
Petitioners,

v.

KFC WESTERN, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Kaufman and Broad Home Corporation and Kaufman and Broad-South Bay, Inc. (collectively "Kaufman and Broad") respectfully submit this amici curiae brief in opposition to the Petition for Certiorari. Kaufman and Broad have obtained the consent of the parties as provided for in Rule 37 of the rules of this court. See Appendix A.

STATUTES INVOLVED

Title 42 of the United States Code, section 6972(a)(1)(B), also known as section 7002(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA), provides in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
>
> (1)(B) against any person, including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . . .
>
> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to

> order such person to take such other action as may be necessary, or both . . . .

42 U.S.C. section 6972(a)(1)(B).

STATEMENT OF INTEREST OF AMICI CURIAE

Kaufman and Broad-South Bay, Inc. is a real estate development company that developed for residential use approximately one hundred acres of real property in Milpitas, California. After discovering that hundreds of barrels of toxic waste had been dumped and buried on the property years before by others, Kaufman and Broad-South Bay spent over $26 million to remedy the dangerous conditions at the site. Kaufman and Broad-South Bay, Inc. is a wholly owned subsidiary of Kaufman and Broad Home Corporation. Subsidiaries of Kaufman and Broad Home Corporation develop homes throughout the State of California. In October, 1992, Kaufman and Broad-South Bay filed an action in the United States District Court for the Northern District of California, captioned Kaufman and Broad-South Bay, Inc. v. Unisys Corporation, et al., No. C-92-20677 EFL, which remains pending in that court. On May 7, 1993, in an order published at 822 F. Supp. 1468 (N.D. Cal. 1993), the district court dismissed that portion of Kaufman and Broad-South Bay, Inc.'s complaint that seeks restitution of response costs under section 7002(a)(1)(B) of RCRA, 42 U.S.C. section 6972(a)(1)(B).

Petitioners here seek review of a decision of the United States Court of Appeals for the Ninth Circuit that expressly "disapprove[s] of the reasoning used by district courts that have dismissed complaints brought under section 6972(a)(1)(B) to the extent the plaintiffs sought reimbursement of clean-up costs." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995). In the ruling challenged here, the Ninth Circuit specifically identifies

the district court order dismissing Kaufman and Broad-South Bay's claim for restitution of response costs as one of the two decisions it criticized. Accordingly, the Ninth Circuit's decision, which is binding on the United States District Court for the Northern District of California, makes it clear that the order dismissing Kaufman and Broad-South Bay, Inc.'s claim for equitable restitution of its response costs cannot stand.

On July, 25, 1995, Kaufman and Broad-South Bay, Inc. moved the district court to reinstate its claim for restitution of response costs under section 7002(a)(1)(B) of RCRA in light of the Ninth Circuit's decision.[1] If the Ninth Circuit's decision is reversed in this case, Kaufman and Broad-South Bay, Inc. will lose an important means of recovering from the responsible parties the millions of dollars it has spent to remedy dangerous environmental contamination that it did not create.

SUMMARY OF ARGUMENT

This case involves the construction of the citizen suit provision set forth in section 7002(a)(1)(B) of RCRA, codified at 42 U.S.C. section 6972(a)(1)(B). The Ninth Circuit, in determining what it described as "a question of first impression," ruled below that "the RCRA citizen suit provision authorizes a private plaintiff to collect restitution of clean-up costs." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 520 (9th Cir. 1995). The

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[1] See Kaufman and Broad-South Bay, Inc. v. Unisys Corporation, et al., No. C-92-20677 EFL, Plaintiff's Motion By Way of Reconsideration Or, In the Alternative, A Motion for Leave to Amend Its Complaint to Reinstate Claim for Restitution Against Unisys Corporation and In Support of Plaintiff's Motion to Add Claim for Restitution Against Trucking Companies (N.D. Cal. July 25, 1995).

Ninth Circuit's decision is consistent with decisions of the Third and Eighth Circuits interpreting identical language found in section 7003 of RCRA, codified at 42 U.S.C. section 6973. See United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Price, 688 F.2d 204 (3d Cir. 1982). No United States Court of Appeals has decided to the contrary.[2]

As the consistent federal appellate authority supporting the decision below attests, the Ninth Circuit's determination is clearly correct. The RCRA citizen suit provision is expressly directed to past conduct and expressly permits a court to order a party responsible for endangering health or the environment "to take such other action as may be necessary." 42 U.S.C. section 6972(a). This statutory language provides clear authority for a court to order a responsible party to make equitable restitution to those who have addressed and alleviated the dangerous condition. Contrary to Petitioners' arguments, the Ninth Circuit has not created a new right of action by implication; it has simply recognized that the right of action already provided by Congress permits an order of equitable restitution. Petitioners do not attempt to argue why the identical language in RCRA sections 7002 and 7003 should be interpreted inconsistently, nor do Petitioners distinguish or even address substantively the Third and Eighth Circuit decisions cited above.

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[2] Petitioners attempt to create a circuit conflict by relying on the self-interested assessment of an oral argument before the Eighth Circuit to support the assertion that the decision below "Will Likely Also Conflict With [An] Impending Eighth Circuit Decision." Petition, at 9-10, 21. Petitioners cannot manufacture a conflict, however, merely by a wishful look at their ouija board.

Accordingly, the petition for a writ of certiorari should be denied.

ARGUMENT

I

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE RCRA CITIZEN SUIT PROVISION AUTHORIZES PRIVATE PARTIES TO SEEK EQUITABLE RESTITUTION OF THEIR RESPONSE COSTS

A. The Broad Grant of Authority in RCRA Section 7002(a)(1)(B) Allows a Court to Order a Party to Make Equitable Restitution.

Section 7002(a) of RCRA, 42 U.S.C. section 6972(a), expressly confers on the district courts the power to order persons who have caused or contributed to contamination "to take such other action as may be necessary." This broad equitable jurisdiction includes the authority to grant restitution and injunctive relief to private parties faced with contamination that may present an endangerment to the environment or human health.[3] Unless specifically limited, Congress' grant of equitable jurisdiction to the courts is not restricted but is presumed to include all of the traditional equitable powers that the courts have historically exercised. As this Court has stated:

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[3] Congress' broad grant of equitable jurisdiction under RCRA Section 7002(a)(1)(B) is discussed in detail in a forthcoming article. See J. Martin Robertson, "Restitution Under RCRA § 7002(a)(1)(B): The Courts Finally Grant What Congress Authorized," 25 Env't.L.Rep. 10491 (September 1995).

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (quoting Brown v. Swann, 35 U.S. 497 (1836)). Accord California v. American Stores Co., 495 U.S. 271, 295 (1990); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

Nothing in section 7002(a)'s broad grant of jurisdiction, by words or inference, limits the district courts' jurisdiction to certain kinds of equitable relief -- for example, as Petitioners suggest, to orders compelling "contamination cleanup" or to actions "required to stabilize and/or eliminate the imminent and substantial endangerment." Petition, at 11-12. To the contrary, if Congress had intended such a limitation, it would have been a simple matter to draft the statute so that courts were limited to ordering only "relief as may be necessary to abate such danger or threat," instead of broadly providing that courts may order responsible parties to take any necessary action. Cf. section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. section 9606(a) (authorizing the President to require the Attorney General "to secure such relief as may be necessary to abate such danger or threat"). To paraphrase Petitioners, when Congress intends relief to be limited to abatement, it expressly says so. Cf. Petition, at 18. In enacting the RCRA citizen suit provision, Congress simply did not impose the limitation that Petitioners now seek to engraft onto the statute. Instead, it conferred on district courts the full power to grant any appropriate equitable relief in light of the necessities of the case.

The Ninth Circuit's reliance on the plain language of the citizen suit provision of section 7002(a)(1)(B) of RCRA also destroys Petitioners' argument that the decision below is inconsistent with Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The questions addressed in Sea Clammers were "whether the FWPCA [Federal Water Pollution Control Act] and MPRSA [Marine Protection, Research and Sanctuaries Act] imply a private right of action independent of their citizen suit provisions" and "whether all federal common-law nuisance actions concerning ocean pollution now are pre-empted by the legislative scheme contained in the FWPCA and MPRSA." Id. at 10-11. The Ninth Circuit, of course, neither implied a private right of action independent of RCRA's citizen suit provision nor relied upon federal common law. Instead, it concluded that the RCRA citizen suit provision itself authorizes the award of equitable restitution and did so by relying on language that Petitioners concede has no counterpart in the FWPCA or MPRSA. Petition at 16. See Federal Water Pollution Control Act, 33 U.S.C. section 1365(a); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. section 1415(g). Accordingly, the decision below is in no way inconsistent with Sea Clammers.[4]

Petitioners' argument that ordering equitable restitution by responsible parties is somehow the impermissible award of money damages is also without merit. First, as indicated above, nothing in the broad grant of authority set forth in RCRA section 7002(a) suggests that remedies are precluded if they can somehow be analogized to awards of money damages. Courts have issued mandatory injunctions requiring the payment of money on

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[4] Because Congress expressly granted a right of action to private parties through the citizen suit provision of RCRA, the petitioners' discussion of Cort v. Ash, 422 U.S. 66 (1975), is also irrelevant.

numerous occasions. See United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982), citing Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); C.B.S., Inc. v. ASCAP, 320 F. Supp. 389, 392 (S.D.N.Y. 1970); United States v. Whiting Milk Co., 21 F. Supp. 321 (D. Mass. 1937), aff'd sub nom., H.P Hood & Sons, Inc. v. United States, 97 F.2d 677 (1st Cir. 1938), aff'd, 307 U.S. 588 (1939). See also Lincoln Properties, Ltd. v. Higgins, 24 Env't.L.Rep. 10491 (E.D. Cal. 1993). Second, the Eighth Circuit Court of Appeals and every district court that has addressed the issue has held that a claim for recovery of response costs under CERCLA, an environmental statute like RCRA, is not an action at law for money damages but is instead an equitable action. See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986) (holding that when the government seeks response costs it is "seeking equitable relief in the form of restitution or reimbursement of the costs it expended in order to respond to the health and environmental danger presented by hazardous substances"). See also Hatco Corp. v. W.R. Grace & Co.–Conn., 859 F. Supp. 769, 774 (D.N.J. 1994), Thaler v. PRB Metal Products, Inc., 810 F. Supp. 49, 50 (E.D.N.Y. 1993) (both cases applying the Northeastern rule to actions between private parties). See also United States v. Mottolo, 605 F. Supp. 898, 912-13 (D.N.H. 1985) (citing seven cases that characterize recovery of response costs under CERCLA as equitable relief). As stated by the Fourth Circuit:

> "[A] person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money." Damages on the other hand, are determined by reference to the loss sustained by a victim as a result of wrongful conduct on the part of another.

United States v. Long, 537 F.2d 1151, 1153-54 (4th Cir. 1975), cert. denied, 429 U.S. 871 (1976) (quoting Restatement of Restitution section 1, cmt. s, at 12 (1937)). See United States v. Valentine, 856 F. Supp. 627, 636 (D. Wyo. 1994) (holding that "contribution qualifies as a form of affirmative equitable relief that would help eliminate the risks posed by toxic wastes").

Accordingly, the Ninth Circuit's determination that RCRA's citizen suit provision authorizes an award of restitution is correct.

B. Analysis of RCRA Section 7002(a) in Relation to RCRA Section 7003 Confirms That Private Parties Are Entitled to Restitution of Their Response Costs.

In concluding that RCRA section 7002(a) authorizes restitution orders in cases brought by private parties, the Ninth Circuit relied on cases interpreting RCRA section 7003, codified at 42 U.S.C. section 6973, which authorizes suits by the Administrator of the United States Environmental Protection Agency (EPA). The Ninth Circuit's analysis in this regard is so compelling that Petitioners do not even attempt to rebut it.

As the Ninth Circuit pointed out, the language permitting citizen suits in RCRA section 7002 is "substantially identical" or "virtually identical" to the language in RCRA section 7003 authorizing the EPA to bring suit. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 522-23 (9th Cir. 1995). In particular, both sections expressly permit the district courts to order responsible persons "to take such other action as may be necessary." 42 U.S.C. sections 6972 and 6973. The congruence of statutory language is no accident: in amending the citizen suit provision in 1984 to authorize district courts "to take such other action as may be necessary," Congress intended that the new version of section 7002

confer upon private parties the right to bring actions "pursuant to the standards of liability established under section 7003." H.R. Rep. No. 198, 98th Cong., 2d Sess., Pt. I, 53 (1983), reprinted in 1984 U.S.C.C.A.N. 5576, 5612. The Senate report contains similar language:

> These amendments are intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United State [sic] under section 7003 [citation omitted]. Any differences in language between these amendments and 7003 are not intended to reflect a difference in the claims, but merely clarify that citizens will have the same claim presently available to the United States.

S. Rep. No. 284, 98th Cong., 1st Sess., at 56-57 (1983); cf. 1984 U.S.C.C.A.N. 5576, 5612.[5] Accordingly, as the Ninth Circuit recognized, there is "no principled reason to distinguish between the relief available to the Administrator and that available to private plaintiffs under the virtually identical provisions." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995). See Middlesex County Bd. of Chosen Freeholders v. N.J., 645 F. Supp. 715, 721 (D.N.J. 1986). Petitioners do not and cannot argue to the contrary. Indeed, even the dissenting opinion below recognized that section 7002(a) and section 7003 should be interpreted consistently. Id. at 524 n.1 (Brunetti, J., dissenting).

As the Ninth Circuit recognized, both the Third and Eighth Circuits have held that the EPA is entitled to restitution of its response costs when it brings an action under section 7003. United

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[5] See also Robertson, supra, note 3, 25 Env't.L.Rep. 10491, 10492-93.

States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 750 (8th Cir. 1986); United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982). Accord, United States v. Conservation Chem. Co., 619 F. Supp. 162, 201 (W.D. Mo. 1985).[6] Because there can be "no principled reason" to distinguish these holdings from the holding below, Petitioners would have to argue that four separate decisions by three separate circuit courts are wrong. Yet Petitioners do not even cite the Northeastern Pharmaceutical & Chem. Co. and Price cases, and do not criticize or discuss the Aceto case (except to conjecture that the Eighth Circuit will ignore or distinguish it). Thus they cannot make this showing.

Accordingly, the decisions interpreting RCRA section 7003 provide additional persuasive support for the decision below.

II

THE NINTH CIRCUIT CORRECTLY DETERMINED THAT KFC SATISFIED THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" REQUIREMENT

Petitioners contend that RCRA's citizen suit provision may never be used where the imminent and substantial endangerment presented by the disposal of wastes has been remedied before suit is filed. Petitioners argue that the Ninth Circuit's contrary holding is barred by this Court's decision in Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 52, 67 (1987), which held that citizen suits may not be brought for "wholly past violations" of the Clean Water

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[6] See also Robertson, supra, note 3, 25 Env't.L.Rep 10491, 10492-93.

Act (CWA), formerly known as the Federal Water Pollution Control Act (FWPCA). This argument is specious.

First, unlike the CWA/FWPCA provision, the RCRA citizen suit provision expressly allows suits concerning past conduct. Indeed, Gwaltney itself specifically cited section 7002(a)(1)(b) of RCRA for the proposition that "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 52 (1987). Petitioners attempt to rely upon Gwaltney for the proposition that "wholly past harms" (which, of course, cannot be meaningfully distinguished from "wholly past violations") are not redressable under RCRA is little short of breathtaking.

Second, as noted above with respect to Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), the citizen suit provision of the CWA/FWPCA does not contain the critical language allowing a court to order "such other action as may be necessary." Accordingly, Gwaltney, like Sea Clammers, cannot be relied on to dictate a limiting construction of that language. Contrary to Petitioners' assertions, the statutory language actually used in RCRA does matter, and the significant differences between this language and the provisions of other environmental statutes precludes an attempt to fabricate an overarching "history" or "purpose" of citizen suits (Petition at 13-14, 28) that overrides the express statutory text.

Both the Eighth and the Ninth Circuits have concluded that the "imminent and substantial endangerment" language limits the sites as to which a RCRA action can be filed, not the time at which such an action should be filed. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir. 1995); United States v. Aceto Agric.

Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989). Petitioners do not cite a single authority to the contrary; instead, they rely solely on Gwaltney for their argument that a RCRA suit is barred when the imminent and substantial endangerment has been addressed before suit is filed. Because there is no dispute here that the site has posed an "imminent and substantial endangerment," RCRA was appropriately utilized with respect to the contamination at the site.

As the Ninth Circuit recognized, adopting Petitioners' position in this regard would be "unfair and poor public pol[illegible]" KFC Western, Inc. v. Meghrig, 49 F.3d 518, 523 (9th Cir. 1995). Those parties that act promptly to address dangerous contamination will be deprived of their RCRA remedy while those who choose to do nothing, or to litigate rather than remediate, will have that remedy preserved. See Bayless Investment & Trading Co. v. Chevron U.S.A., 39 Env't Rep. Cas. (BNA) 1428, 1432 (D. Ariz. 1994). In short, Petitioners "would foreclose a RCRA remedy for the innocent buyers who clean up contaminated property." KFC Western, Inc. v. Meghrig, 49 F.3d 518, 524 (9th Cir. 1995). They would also eliminate vital incentives for parties to engage in cleanup activity. Recognizing a cause of action for restitution following cleanup is the only way of implementing Congress's intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks poses by toxic wastes." United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982).

CONCLUSION

For all these reasons, the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case should be denied.

DATED: August 23, 1995

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APPENDIX A

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ATTORNEYS AT LAW

August 11, 1995

VIA FEDERAL EXPRESS

Chulho Song
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Re: Alan and Margaret Meghrigs v. KFC Western, Inc.

Dear Mr. Song:

In response to your request, petitioners Alan and Margaret Meghrig consent to the filing of an amicus curiae brief by Kaufman & Broad Home Corporation and Kaufman & Broad South Bay, Inc. in opposition to the Petition for Writ of Certiorari.

Very truly yours,

John P. Zaimes
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APPENDIX A

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August 9, 1995

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Re: Consent to Filing Of An Amicus Brief

Dear Mr. Kammer:

On behalf of KFC Western, Inc., I hereby consent to the filing of an amicus curiae brief by Kaufman and Broad Home Corporation, by and through its counsel of record, in opposition to the Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit, petitioned to the United States Supreme Court, October Term, 1995, by Petitioners Alan Meghrig and Margaret Meghrig. This letter is intended to satisfy the consent requirements of Rule 37 of the Supreme Court.

Very Truly Yours,

Daniel Romano

DR:lrc

William N. Kammer BAR #: 53848
GRAY CARY WARE & FREIDENRICH
A Professional Corporation
401 B Street, Suite 1700
San Diego, CA 92101
619-699-2711

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ALAN MEGHRIG and MARGARET MEGHRIG, Petitioners, vs. KFC WESTERN, INC. Respondent.	CASE NO. 95-83 DECLARATION OF SERVICE Person served: See Below Date Served: August 24, 1995

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; that I served the person(s) named below the following documents: **BRIEF OF KAUFMAN AND BROAD HOME CORPORATION AND KAUFMAN AND BROAD - SOUTH BAY, INC. AS AMICI CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

in the following manner: (check one)

1) ☐ By personally delivering copies to the person served.

2) ☐ By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

3) ☐ By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his office or place

of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

4) ■ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named below and depositing each in the U.S. Mail at San Diego, California, for delivery, by First Class Mail, CERTIFIED MAIL, on August 24, 1995.

Executed on August 24, 1995 at San Diego, California.

Connie Garner

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Clerk of the United States Supreme Court
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